

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:PIT:POSTF-150434-01

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date: May 29, 2002

to: Ellen Pawlowski, Team Coordinator

from: Richard S. Bloom CC:LM:HMT:CLE:PIT
Associate Area Counsel

subject: IDR Language for Business Plan/Strategic Plan: Leasing Issues.
UIL Nos. 7602.03-05; 7602.07-02

This memorandum responds to your request for assistance dated May 22, 2002. This memorandum should not be cited as precedent. This memorandum has been referred to the National Office for 10-day post-review. We have forwarded this memorandum for post-review to make certain that the National Office will support summons enforcement if it is necessary to proceed to enforcement in order to secure the information which you are seeking. Since this memorandum has been sent for post-review, please do not take any action in response to this document until the conclusion of that 10-day period, or before Monday, June 10, 2002. Additionally, we recommend that you contact our office before you take any further action on this matter so that we may tell you the results of the post-review.

You have asked for assistance in drafting and defending a particular Information Document Request. You are seeking business plans and strategic plans prepared either by the taxpayer or on behalf of the taxpayer. The information will assist you in understanding the taxpayer's overall business plan, including the types of investments, level of anticipated expenditures, general allocation of resources, sources of funding, etc. Of particular relevance to your evaluation of both the [REDACTED] and the [REDACTED] that are currently under examination, the information should show you whether the transactions were integrated into the company's mainstream business operations and, if so, how and why. This information is particularly useful when evaluating the alleged business purposes for these transactions.

The current cycle under audit is for the [REDACTED], [REDACTED] and [REDACTED] income tax years. Either [REDACTED] or [REDACTED] were entered into in each of these years. Additionally, [REDACTED] were entered into during the years in the prior audit cycle

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(████ and █████ tax years), which prior cycle has been closed out and is currently in Appeals to pursue administrative settlement.

To the best of your knowledge, there were no █████ or █████ entered into prior to █████. The taxpayer, however, was engaged in some █████ transactions prior to █████. Finally, it is our understanding that the taxpayer has indicated that it decided that it was going to move into the █████ business sometime in █████.

To fully understand how both the █████ and the █████ fit into the taxpayer's overall business, and how these transactions may differ from transactions previously conducted by the taxpayer, it would be useful to review the taxpayer's business plans and strategic plans for the years █████ through the current year. The years prior to the current cycle are relevant to evaluating the development of the alleged business purposes, and the years subsequent to the audit cycle are relevant to gauge the taxpayer's continued commitment to its leasing business. Did the taxpayer abandon this type of activity after tax law changes made them unattractive as tax shelters, or for other reasons? Or, is the taxpayer still committed to this activity as part of its overall business plan? While the annual reports presented to the stockholders and the world at large generally show what direction the taxpayer decided upon, the annual reports do not disclose what other plans were under consideration and the considerations and or concerns addressed when adopting the plans disclosed in the annual reports.

Accordingly, we believe that an IDR request should be issued for the following:

1. Please provide copies of all business plans and strategic plans prepared during the years █████ through the current year;
2. For each business plan and/or strategic plan submitted, please identify all person(s) who worked on the preparation of the document; and
3. For each business plan and/or strategic plan submitted, please identify all persons who were either given a copy of the document(s) or who were at a meeting, presentation or other gathering at which the subject contained in the documents was discussed (e.g., presentations to the board or to committees, meetings to

prepare the plans, etc.),¹ and provide copies of any documentary evidence which identifies the attendees (e.g., sign-in sheets, minutes, etc.).

An IDR has already been issued with the following request: "Please provide copies of all business plans and strategic plans prepared during the years the taxpayer engaged in the [REDACTED] [REDACTED]."² The taxpayer understands this request as including business plans and strategic plans prepared during [REDACTED]. The taxpayer has objected to this IDR, stating that it is both overbroad and an unauthorized second inspection of documents from tax years that were already examined and closed out since the IDR request would reach plans prepared in the [REDACTED] and [REDACTED] tax years. Since we have recommended looking even further back to the alleged inception of the leasing business of the taxpayer, [REDACTED], these arguments would be raised to the IDR which we are suggesting that you issue.³

¹ The items at ## 2 and 3 call for testimony (unless there are documents which show who was at certain meetings, for example sign-in sheets or minutes). If a summons is issued, the summons will clearly call for the testimony of a witness(es) that can address these requests by providing testimony.

² [REDACTED]

[REDACTED]

³ Obviously, if you decide to issue the IDR suggested herein, you would inform the taxpayer that you are pulling the previously issued IDR [REDACTED].

We believe that the Internal Revenue Service could successfully defend against the taxpayer's assertions if the taxpayer decides not to respond to the IDR and a summons was issued for these items.

The relevancy of the items sought in the request is discussed above. Under I.R.C. § 7602(a)(1), the Internal Revenue Service is authorized "to examine any books, papers, records, or other data which may be relevant or material" (emphasis added) to the Service's inquiry into the correct tax liability of a taxpayer. In United States v. Arthur Young & Co., 465 U.S. 805, 814 (1984), the Supreme Court stated:

The language "may be" reflects Congress' express intention to allow the I.R.S. to obtain items of even potential relevance to an ongoing investigation, without reference to admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until they are procured and scrutinized.

The requested information meets this relevancy threshold test.

The objection as currently stated, that the request is overbroad, is also without merit. A request is overbroad if it fails to describe the requested documents with sufficient detail so that the summoned party will not know exactly what is to be produced in response, or if it seeks information which is not relevant for the years under examination. This is not a problem with either the outstanding request, or the suggested request outlined above.

By the "overbroad" exception, however, the taxpayer may be stating that the request is too burdensome. Generally, if the request is finite in nature, adequately describes what is required of the taxpayer to produce, and the items requested are relevant to the Service's inquiry, the summons will be approved. The fact that it may take a lot of effort on the taxpayer to comply, at significant expense, does not make the request unenforceable.

Finally, there is no merit to the "second inspection" objection. I.R.C. § 7605(b) provides, in part, that:

...only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary. (emphasis added)

While you have requested records that were produced in years prior to the years under examination, including records produced in tax years that were examined and closed, you are seeking access to those "books of account" in connection with the tax liability for the years currently under audit. This is in connection with the first inspection of the [REDACTED], [REDACTED] and [REDACTED] income tax returns. It does not matter that the records are from prior years, or may have even been relevant to the examination of prior years.⁴ Norda Essential Oil and Chemical Co., Inc. v. United States, 230 F.2d 764 (2nd Cir. 1956). See also Dahl v. Commissioner, T.C. Memo. 1974-190 (1974), aff'd 526 F.2d 552 (9th Cir. 1975); United States v. Krilich, 470 F.2d 341 (7th Cir. 1974).

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any questions, please call Donna P. Leone at 412-644-3442.

RICHARD S. BLOOM
Associate Area Counsel
(Large and Mid-Size Business)

By: _____
DONNA P. LEONE
Senior Attorney (LMSB)

cc: Kathy Beck

⁴ Please ascertain whether it is possible that this information is already in the possession of the Internal Revenue Service since it may have been secured in the prior audit. If it was secured in the prior audit, was retained, and is reasonably accessible to the Service, then a summons for the information cannot be enforced.